Child Protection Accountability Commission
Training Committee
De-Escalation of Life Support Workgroup
June 14, 2017
A.I. duPont Hospital for Children

Meeting Minutes

In Attendance:

Carole Davis, Esq.	Department of Justice
Dr. Allan De Jong	A.I. duPont Hospital for Children
Dr. Stephanie Deutsch	A.I. duPont Hospital for Children
Susan Gordon, Esq.	Christiana Care
Mark Hudson, Esq., Co-Chair	Office of the Child Advocate
Honorable Peter B. Jones	Family Court
Jennifer Macaulay	A.I. duPont Hospital for Children
Dr. Elissa Miller	A.I. duPont Hospital for Children
Phyllis Rosenbaum, Esq.	A.I. duPont Hospital for Children
Molly Shaw, Esq., Co-Chair	Office of the Child Advocate
Susan Taylor-Walls	Division of Family Services
Janice Tigani, Esq.	Department of Justice

I. Welcome and Introductions

The Co-Chairs opened the meeting and attendees introduced themselves.

II. Approval of Minutes – 5/1/17 Meeting

The draft minutes were approved as written.

Susan Taylor-Walls clarified information presented at the 5/1/17 meeting regarding online reports. Serious physical injury reports cannot be made online and must be called into the hotline.

III. Discussion of Multidisciplinary Response Area 2: Court Action

a. Stage of Proceedings

The group discussed the fact that the Court likely cannot rule on a Motion for De-Escalation or Limitation of Care until after an Adjudicatory Hearing has been held and the child has been adjudicated dependent, neglected, or abused in the parents' care. If a decision needs to be made

prior to such adjudication, the medical team must proceed as it sees fit, with the parents retaining the right to make the decision.

The hospital staff agreed that approximately two weeks after the injury is when they will know if a recommendation to de-escalate or limit care will be made, and that generally another week or two after that is when action needs to be taken. If the injuries are the reason the child entered care, this timeframe may occur before an Adjudicatory Hearing has been held. When possible, counsel for DFS or the child's attorney should request an Adjudicatory Hearing be scheduled as early as possible if it appears that important medical decisions will need to be made on the child's behalf. The hospital, DFS, and the child's attorney should work diligently to obtain and distribute medical records, DFS internal records, and any other necessary records as quickly as possible so an expedited Adjudicatory Hearing may be held. Requests for medical records from AI can be sent to Jen Macaulay, who can help expedite those requests. A request can also be made for multiple discs to make sharing records with other counsel easier.

In terms of best practice, it was agreed that it is incumbent upon the attorneys involved to let the Court know when urgent matters such as this arise and to request that hearings be scheduled or rescheduled as needed. Communication among the attorneys to see if hearings, such as an Adjudicatory Hearing, can be held sooner if needed is vital. The attorney filing the Motion for De-Escalation or Limitation of Care should also request that the Adjudicatory Hearing and a hearing on the motion be consolidated if necessary.

b. Scenarios Regarding Parents' Position

Once an adjudication of dependency, neglect, or abuse has been made by the Court, this protocol should be followed for any child in DFS custody for whom a recommendation to de-escalate or limit care is being made by his or her medical providers. The group discussed various scenarios that may occur under such circumstances and how they should be handled.

1. **All parties (parents, DFS, and child's attorney) agree that de-escalation or limitation of care is in the child's best interest.**

   In cases where all parties are in agreement with the medical recommendation, a motion should still be filed with the Court, pursuant to the *Truselo* decision. The rationale is that ending the life of a child is a serious and permanent decision, and when the state has custody of a child for any reason, the Court should review such a decision first in furtherance of its duty of *parens patriae*, to ensure the decision is in the best interest of the child.

2. **Parents do not agree to de-escalation or limitation of care, the decision is reasonable after active participation in an informed consent conversation with the doctors, and the parents are not suspected of having caused the injuries (child is dependent or neglected in parents' care on other grounds).**

   In these cases, the parents should have the right to make the decision, and the hospital should notify DFS and child's attorney of the decision but should proceed with necessary medical procedures without delay or Court involvement.

3. **Parents do not agree to de-escalation or limitation of care but decision is not reasonable and/or the parents are suspected of having caused the injuries.**

   In these cases, the hospital should notify DFS and child's attorney and wait to perform any medical procedures. These cases will generally result in the child's attorney filing a motion for de-escalation or limitation of care with the Court.

4. **One parent agrees and one parent disagrees.**

   If the parents disagree with each other, generally the parent who favors de-escalation or limitation of care will be the one to file a motion with the Court.

There followed a discussion about why parents would be permitted to make medical decisions for their child up to the point of the decision to de-escalate or limit care, but not be allowed to make that decision. The rationale is that the decision to take steps to end a child's life is extreme and irreversible, in a way other medical procedures generally are not. So long as parents are cooperative and making decisions that are in the best interest of the child, they should be allowed to do so. However, if a decision to de-escalate or limit care is made that will result in the child's death, the Court should review that decision pursuant to the *parens patriae* doctrine to make sure it is in the child's best interest. Alternatively, if a parent is suspected of causing the life-threatening injuries, and they refuse to consent to de-escalation or limitation of care, there is an inherent conflict of interest between what is best for that parent (e.g. not being charged with murder for the child's death) and what is best for the child (not prolonging his or her suffering), and thus the parent should not be permitted to make such a decision.

c. Filing the Motion

In most cases, the child's attorney will be the one to file a motion to de-escalate or limit care when such motion is needed.

At the team meeting to convey the recommendation to de-escalate or limit care, the medical team will communicate the timeframe in which a decision needs to be made. Although the parents need not make a decision on the spot, the child's attorney should begin preparing a motion in the event it will be needed.

Communication among attorneys will be crucial to ensure swift handling of the motion by the Court. The attorney filing the motion should make the other attorneys aware the motion will be coming. Medical records should be distributed to all attorneys as soon as possible if they have not already been shared. If counsel has not yet been appointed for a parent, the motion should include a request that the Court provisionally appoint counsel for the parent, and records should be sent to the attorney anticipated to be appointed.

The attorney filing the motion should consult with the medical team to determine if the motion should be filed on an emergency basis, which requires a finding of immediate and irreparable harm. In addition, the attorney should consult with the medical team, including the hospital's counsel, to ensure the motion and draft order clearly indicate the appropriate relief.

d. Independent Medical Evaluation

Discussion of this issue was deferred to the next meeting.

e. Court Hearing and Decision

An issue that may affect the scheduling of hearings is the availability of doctors to testify. Telephone testimony is one option, but all parties may not agree to it. Although a Judge could still allow it, telephone testimony may present credibility issues for the Judge. Another option is video testimony. This option too presents some challenges. First, there may not be compatibility between the Court's video system (Skype for Business) and the technology used by the hospital or doctor. This Workgroup could make a recommendation to CPAC that CPAC encourage funding for compatible technology between the Court and AI. Another option would be for the doctors to travel to the nearest Courthouse for video testimony if the hearing is in another county and they cannot attend in person. If either telephone or video testimony is being utilized, the witness and counsel should all be provided with a packet of records with distinctly numbered

pages that the witness may rely on. Despite these two options, the first option should always be live testimony, and the attorneys should make every effort to allow for live testimony. Hospital staff indicated they would be willing to accommodate the Court's schedule and find coverage from their colleagues if necessary, although there may be occasions where doctors in smaller practices may not have the ability to find such coverage.

Judge Jones indicated that the Court will endeavor to hear cases as quickly as possible, make decisions as quickly as possible, and schedule hearings as closely in time as possible if multiple days are needed, but reminded the group that it is incumbent upon the attorneys to make the Court aware of the urgency and to make the appropriate requests for scheduling.

f. Appeal

As a professional courtesy, if any party intends to take an appeal from the Court's decision on a motion to de-escalate or limit care, that party's attorney should notify the other attorneys that they will be appealing. The Court will certify any interlocutory appeal that is taken in such a case. Certifying an interlocutory appeal was a learning process for the Court in the Hundley case; knowing what steps to take will help the process move more efficiently in the future and perhaps can be included as part of the protocol. During the pendency of an appeal, a Stay of Execution of the Court's Order will need to be requested.

There was some discussion about the obligation to alert the Supreme Court if there are any changes to the child's status during the pendency of an appeal. An important component to this would be whether or not the change affects the underlying recommendation to de-escalate or limit care. The co-chairs will reach out to the Office of Disciplinary Counsel and request guidance on this issue. At a minimum, all counsel should be made immediately aware of any changes and any attorney who feels they should alert the Supreme Court can do so. The co-chairs will also research the ability of a party to request oral argument on an appeal.

As with all other aspects of this protocol, communication between the medical team and counsel is crucial during the appeal process.

IV. Next Meeting Date

The next meeting will be held on September 19, 2017, from 12:00-2:00 p.m. The meeting will be held at A.I. duPont Hospital for Children, with video conferencing to the Sussex County Family Courthouse as well as a telephone conference call line.

V. Public Comment

There were no members of the public present.

VI. Adjournment

The meeting was adjourned at 3:00 p.m.